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No. 386

# In the Supreme Court of the United States

*October Term, 1934.*

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, *Appellants,*

*vs.*

R. O. JENKINS, *Appellee.*

## Brief of Appellants in Opposition to Motion to Dismiss or Affirm.

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IN THE SUPREME COURT OF THE UNITED STATES.

*October Term, 1934.*

No. .....

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, *Appellants,*

*vs.*

R. O. JENKINS, *Appellee.*

# BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

## Decision Below.

This is an appeal from the decision of the Supreme Court of Arkansas modifying and affirming a judgment for damages against appellant Phillips Petroleum Company in favor of appellee and upholding the validity of section 7137, Crawford & Moses Digest of the Statutes of Arkansas, as against the contention that the same in so far as it abrogates the common law fellow-servant rule as to all corporations contravenes the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States. The opinion is reported in 82 S. W. (2d) 264.

**Jurisdiction.**

The date of the judgment of the Supreme Court of Arkansas is May 6, 1935. Appellant Phillips Petroleum Company filed a petition for rehearing which was overruled on June 10, 1935. The petition for appeal was presented to the Chief Justice of the Supreme Court of Arkansas on June 24, 1935. Appellant United States Fidelity & Guaranty Company executed a supersedeas bond as surety for appellant Phillips Petroleum Company on appeal from the trial court to the Supreme Court of Arkansas. Judgment was rendered by the Supreme Court of Arkansas against United States Fidelity & Guaranty Company on the bond. For that reason the United States Fidelity & Guaranty Company joined in the appeal to this court.

Appellants invoke the jurisdiction of this court under Judicial Code, section 237(a), as amended (Title 28, U. S. C. A., section 344).

**Appellee's Motion to Dismiss or Affirm.**

Under date of July 6, 1935, appellee served upon counsel for appellants a copy of a "Motion to Dismiss or Affirm" and a copy of "Statement Making Against Jurisdiction and Argument in Support of Motion to Dismiss or Affirm." This brief is filed pursuant to paragraph 3 of Rule 12 of this court.

## ARGUMENT.

The grounds of the motion to dismiss are *(1)* "want of jurisdiction; *(2)* "because the record fails to show that appellant is within the class with respect to whom it is alleged the statute under examination is unconstitutional"; *(3)* "because the record does not properly present a substantial federal question"; *(4)* "because the appeal is informal, irregular, and insufficient for reasons stated in the annexed argument and statement denying jurisdiction, and upon other grounds."

The ground for the motion to affirm is "that it is manifest that the appeal herein was taken for delay only, and that the question upon which it is claimed that the jurisdiction depends are [is] so frivolous as not to need further argument."

Three points are argued by appellee under the designations "A," "B," and "C," respectively. We shall discuss those points in the same order and under the same title as appellee.

### A.

### Record Fails to Show Appellant of Class Entitled to Raise Question.

Under this title appellee, without as much as intimating that appellant Phillips Petroleum Company is a railroad company or a company engaged in mining coal, advances the highly technical contention that the record does not show whether appellant does or does not operate a railroad

or a coal mine; that the statute is constitutional in so far as it affects railroad companies and companies engaged in the mining of coal; and that inasmuch as there is no affirmative showing that appellant is not of that class, it is in no position to urge that the statute is invalid as to all corporations.

Our answer to that contention is three-fold:

*(1)* Appellee's complaint alleges, and appellant's answer admits, that appellant is a foreign corporation and engaged in the production and transporation of oil and gas, which, in the absence of anything further, is sufficient to show that appellant is not a railroad company or a company engaged in mining coal.

*(2)* The burden was upon appellee to allege and prove that appellant was a railroad company or a company engaged in mining coal in order to bring his case within those provisions of the statute, and having alleged and established, only that appellant is a corporation, his case must stand or fall upon the validity or invalidity of the statute as applied to all corporations.

*(3)* The Supreme Court of Arkansas having decided the case on the theory that only that portion of the statute applicable to all corporations was involved, and having held the same valid, the jurisdiction of this court cannot be avoided by showing that the case might have been decided upon other grounds.

*(1)* Appellee alleged in his complaint (R. ...):

> "That the defendant, Phillips Petroleum Company, is a foreign corporation, authorized to do business in the State of Arkansas, and is engaged in the business of operating oil and gas wells, producing oil

and gas and laying and operating pipe lines for the transportation of oil and gas in the State of Arkansas, and in the counties of Ouachita and Union, and at all times mentioned herein was engaged in such business."

"That on April 5th, 1934, and for some time prior thereto, the plaintiff was in the employ of the defendant, Phillips Petroleum Company, in connection with the operation of its oil and gas wells and pipe lines in the State of Arkansas, and the counties of Ouachita and Union, in the capacity of a laborer; that defendant, Joe H. Myers, was at all times mentioned herein an employee of defendant, Phillips Petroleum Company, and a fellow-servant of plaintiff."

Appellant's answer (R. . .) admitted that it is a corporation organized to do business in Arkansas and engaged in the production and transportation of oil in Union and Ouachita counties, Arkansas, and that on April 5, 1934, plaintiff was in its employ, and that he, together with other employees of appellant, were engaged in stringing pipe at appellant's Fleming lease in Union County, Arkansas.

In the absence of anything further this was sufficient to affirmatively show that appellant was neither a railroad company nor a company engaged in mining coal. There was no occasion for appellant to allege and prove that it was not such.

*(2)* In support of his contention that the burden was upon appellant to affirmatively show that it was not a railroad company or a company engaged in mining coal, appellee cites the following cases:

*Aluminum Company* v. *Ramsey,* 222 U. S. 251, 56 L. ed. 185;

*Wilmington Star Mining Company* v. *Fulton,* 205 U. S. 60, 51 L. ed. 708;

*Heald* v. *District of Columbia*, 259 U. S. 114, 66 L. ed. 852;

*Albany County* v. *Stanley*, 105 U. S. 305, 26 L. ed. 1044;

*New York, ex rel. Hatch*, v. *Reardon*, 204 U. S. 152, 51 L. ed. 415;

*Citizens National Bank* v. *Kentucky*, 217 U. S. 443, 54 L. ed. 832;

*Plymouth Coal Company* v. *Pennsylvania*, 232 U. S. 531, 58 L. ed. 713;

*Thomas Cusack Company* v. *Chicago*, 242 U. S. 526, 61 L. ed. 472;

*Arkadelphia Milling Company* v. *St. Louis Southwestern R. Co.*, 249 U. S. 134, 63 L. ed. 517.

Those cases support the rule as stated by Mr. Justice BRANDEIS in *Heald* v. *District of Columbia, supra*, that "one who would strike down a state statute as violative of the federal constitution must show that he is within the class of persons with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him." There was no question in that case or in the other cases cited as to the burden of proof. The facts were disclosed by the record and upon the facts as they appeared from the record the complaining party was not injured by the alleged unconstitutional feature of the statute. For example, in the *Heald* case a resident of the District of Columbia filed suit as committee of Peters, an insane person, also a resident of the District of Columbia, to recover certain taxes levied by Congress upon intangible properties of persons resident or engaged in business within the district. The Act of Congress was attacked on the grounds that it was invalid as to non-residents of the district and levied a tax upon bonds of states and their municipalities.

The court held that, since the plaintiff was a resident of the district and the property on which the tax was levied did not include any state or municipal bonds, he was in no position to raise the question.

The cases cited by appellee would be applicable here only if the record affirmatively showed that appellant was a railroad company or a company engaged in mining coal. The question of where lies the burden of proof was not considered in any of those cases. That is a question not difficult of solution. It depends upon the nature of the attack upon the statute. In suits brought by persons claimed to be affected by the statute for affirmative relief, such as the recovery of taxes paid or to enjoin the enforcement of a statute, the buden will, of course, rest upon them to prove that they come within the particular class of persons as to whom the statute is invalid. Likewise, in a suit such as this, to enforce a right created by statute, the burden is upon the plaintiff to prove that the defendant is one as to whom the statute is valid and that his cause of action is one coming within the valid provisions of the statute. An unconstitutional statute is the same as no statute. If the statute in question is void as to corporations in general it is the same as if its express provisions limited its application to railroad companies and companies engaged in mining coal. If the statute had so read and the plaintiff had filed this suit it would have been incumbent upon him to allege and prove that the defendant came within one of those provisions.

—*Brinkmeier* v. *Missouri Pacific Ry. Co.*, 224 U. S. 268, 56 L. ed. 758;

*United States* v. *Perryman*, 100 U. S. 235, 25 L. ed. 645;

*St. Louis, I. M. & S. Ry. Co.* v. *Hesterly*, 98 Ark. 240, 135 S. W. 874;

*L. T. Dickason Coal Co.* v. *Unverferth*, 30 Ind. App. 546, 66 N. E. 759.

At common law the master was not liable for injuries to an employee caused by the negligence of a fellow-servant. *Northern Pacific R. Co.* v. *Peterson*, 162 U. S. 346, 40 L. ed. 994; 39 C. J. 537. And a complaint which shows that the negligence on which the cause of action is based is that of a fellow-servant, in the absence of a statute, is demurrable.

—*Ashley* v. *Hart*, 147 Mass. 573, 18 N. E. 416, 1 L. R. A. 355;

*Central of Georgia* v. *Lamb*, 124 Ala. 172, 26 So. 969;

39 C. J. 935, 940, and cases cited.

It follows that the burden was upon appellee to allege and prove that appellant was a railroad company or a coal mining company in order to take advantage of those provisions of the statute. Having failed to allege or prove those facts, and they not otherwise appearing, the judgment in this case can be sustained only under that portion of the statute applicable to all corporations. And that is the theory upon which the case was decided both by the trial court and by the Supreme Court of Arkansas.

Appellant has fully met the burden of proving that it "is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him." Not only has it shown that the judgment in this case could only be sustained under that provision of the statute applicable to all corporations, but it has shown that the case was actually decided by the lower courts upon that theory.

*(3)* The contention now made by appellee was not so much as suggested to the Supreme Court of Arkansas. On the other hand it was there contended by appellee that the statute was valid as to all corporations as had been held by that court on numerous occasions. In ruling upon this question the Supreme Court said:

> "The petroleum company, in its motion for a new trial, filed approximately sixty-four days after the return of the verdict, raised the question of the constitutionality of section 7137, Crawford & Moses' Dig., upon which the liability of the petroleum company is predicated. This section abrogates the fellow-servant law in so far as it applies to corporations and creates liability as to them for injury to employees caused by negligence of fellow-servants. The contention that said act is unconstitutional is one of the grounds urged for a reversal of the judgment. It is the contention of the appellee that this question was waived by the failure of the defendant in the court below to interpose this defense by demurrer, answer, or other appropriate plea. We pass this contention for the reason that this court, in numerous decisions for a period of more than twenty-five years, has upheld the constitutionality of section 7137, *supra*, the latest expression being in the case of *Postal Tel.-Cable Co.* v. *White*, (Ark.) 80 S. W. (2d) 633."

At most, appellee's contention amounts to the proposition that the Supreme Court of Arkansas might have decided the case upon a ground other than the one which it did. If appellee's contention is valid it should have been presented to the Supreme Court of Arkansas. But that was not the theory of appellee in the Supreme Court of Arkansas, and that was not the theory upon which the case was decided. Moreover, as we have shown above, the Supreme Court of Arkansas, under well settled principles;

could not have so ruled on the record in this case. Had it done so, the non-federal ground of the decision would have been unsubstantial and this court would have jurisdiction to review the judgment.

—*Broad River Power Company* v. *South Carolina*, 281 U. S. 537, 74 L. ed. 1023;

*Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 74 L. ed. 1107.

The jurisdiction of this court to review the ruling of a state court upon a constitutional question cannot be avoided by showing that the state court might have decided the case upon other grounds. *First National Bank* v. *Anderson*, 269 U. S. 341, 70 L. ed. 295; *Chicago, Rock Island & Pacific R. Co.* v. *Perry*, 259 U. S. 548, 66 L. ed. 1056. In the first case cited it was urged by motion to dismiss that this court was without jurisdiction because, although the state court decided the federal question, the judgment could be sustained on another ground, namely, that the suit was not one in which relief might be had in equity, there being an adequate remedy at law, etc. This court, in disposing of that contention, said:

> "The second ground is not better. The Supreme Court of the state treated the case as cognizable in equity and perceived no obstacle to a consideration of the merits as displayed in the petition. In this that court was proceeding within limits where the state laws and practice were controlling, and its action is not open to revision here."

The second case cited is even more conclusive. That case involved the validity of the "Oklahoma Service Letter Act." The Supreme Court of Oklahoma passed upon the constitutionality of the act and held it valid. In dispos-

ing of a motion to dismiss the writ of error, this court said:

"Defendant in error moves to dismiss the writ of error on the ground that the constitutionality of the act was not really at issue; that the trial judge's instructions to the jury show that the only substantial question was whether the statements made in the letter actually given by the defendant were false and derogatory, and whether plaintiff had suffered damage thereby. But since the court of last resort of the state actually dealt with and passed upon the question raised by plaintiff in error as to the validity of the statute upon the ground of its being repugnant to the Constitution of the United States, and decided in favor of its validity, it is clear that, under the first paragraph of Sec. 237, Judicial Code, as amended by Act of September 6, 1916, Chap. 448, 39 Stat. at L. 726, Comp. Stat., Sec. 1214, Fed. Stat. Anno. Supp. 1918, p. 412, we have jurisdiction to pass upon the question, and the motion to dismiss must be denied. * * *

"Again, in discussing the merits, defendant in error insists that the federal question is not necessarily involved; that the constitutional objection was waived when the company, instead of refusing to give a letter, of its own volition gave to Perry, upon his dismissal, a service letter which was false and derogatory, and which caused special damage that was pleaded and proved. At first blush, it seems somewhat strange for the company to aver that it acted under compulsion of a void statute, when what it did was contrary to the command of the statute; it almost looks as if it were merely held in damages for what ordinarily might be called a libel. *But the case cannot properly be dealt with upon this ground. The Supreme Court of Oklahoma not only passed upon the question of the constitutionality of the Service Letter Law, but deemed it necessary to pass upon it. So far as can be gathered from its opinion, there was no other legal ground upon which the judgment could be supported.* Apparently,

under the law of Oklahoma, apart from the statute, no legal duty was imposed upon the employer in such a case to speak the truth in a communication made respecting a discharged employee, nor was there other ground of liability for damages in case of its falsity. The statute is the essential foundation upon which the judgment rests, and we cannot find that the objections to its validity have been waived." (Emphasis ours.)

In *Ohio, ex rel. Clarke,* v. *Deckebach,* 274 U. S. 392, 71 L. ed. 1115, this court said:

"At the outset defendant insists that plaintiff has not established that he is entitled to the benefit of the treaty since his allegation of citizenship is not admitted on the face of the pleadings. But the Supreme Court of Ohio has construed the pleadings as sufficient to draw in question the validity of the ordinance under the treaty. Hence we need not concern ourselves with those refinements of the local law of pleading which, it is said, enable defendant to justify his refusal to issue a license because of plaintiff's assertion of British citizenship, and at the same time deny that plaintiff has established citizenship entitling him to the protection of the treaty."

This court has repeatedly held that no matter how or when the constitutional question is raised, to the extent that it is passed upon by the state Supreme Court, this court has jurisdiction to review the judgment. Thus, in *Nickey* v. *Mississippi,* 292 U. S. 393, 78 L. ed. 1323, this court said:

"So far as the state court discussed these contentions, with specific reference to the Constitution of the United States, both in its original opinion, and in an opinion denying the appellants' application for rehearing, they may be reviewed here, notwithstanding the failure of appellants to mention them in their assignment of errors to the state Supreme Court, as required by its rule."

And in *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 72 L. ed. 565, the court said:

> "We may disregard the ambiguity of the trustees' contention below that the statutes were 'unconstitutional,' in so far as the state court understood that the Federal Constitution was the basis for the objection and in its opinion sustained the statutes under that instrument * * *. To that extent the case is properly here on writ of error."

The Supreme Court of Arkansas having deemed it necessary to pass upon the constitutionality of the statute as applied to corporations, and having done so, the case is properly here.*

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*It has been suggested by counsel for appellee that the constitutional question was not raised in the trial court. While that point is immaterial in view of the fact that the Supreme Court of Arkansas actually passed upon the constitutional question (*Rothschild* v. *Knight*, 184 U. S. 334, 46 L. ed. 573; *San Jose Land and Water Co.* v. *San Jose Ranch Co.*, 189 U. S. 177, 47 L. ed. 765; *Manley* v. *Park*, 187 U. S. 547, 47 L. ed. 296; *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 74 L. ed. 926; *Abie State Bank* v. *Bryan*, 282 U. S. 765, 75 L. ed. 690; *Grayson* v. *Harris*, 267 U. S. 352, 69 L. ed. 652; *Rogers* v. *County of Hennepin*, 240 U. S. 184, 60 L. ed. 594; *Gant* v. *Oklahoma City*, 289 U. S. 98, 77 L. ed. 1058; *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 77 L. ed. 360; *Fiske* v. *Kansas*, 274 U. S. 380, 71 L. ed. 1108; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 L. ed. 239; *Sully* v. *Am. Nat. Bank*, 178 U. S. 289, 44 L. ed. 1072; *Nickey* v. *Miss.*, 292 U. S. 393, 78 L. ed. 1323, 1325; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 72 L. ed. 565, 566; *Cumberland Coal Co.* v. *Bd. of Revision of Tax Assessments in Greene County, Pa.*, 284 U. S. 23, 76 L. ed. 146), we cannot let this statement go unchallenged. Whether or not a constitutional question is properly raised is a question for this court and not the state court. *First National Bank* v. *Anderson, supra.* In this case appellant requested the court to instruct the jury to return a verdict in its favor and excepted to the instruction of the court to the jury that appellant was liable for the acts of negligence of its employee Myers. The constitutionality of the statute upon which appellee's cause of action was based was thereby drawn in question (*People of New York* v. *Zimmerman*, 278 U. S. 63, 73 L. ed. 184, 62 A. L. R. 785; *International Harvester Co. of America* v. *Missouri*, 234 U. S. 199, 58 L. ed. 1276; *National Mutual Building & Loan Assn. of New York* v. *Brahan*, 193 U. S. 635, 48 L. ed. 823; *Murray* v. *Charleston*, 96 U. S. 432, 24 L. ed. 760; *Scott* v. *Eaton*, 15 Wall. 380, 21 L. ed. 72; *Murdock* v. *Mayor of Memphis*, 20 Wall. 590, 22 L. ed. 429, 441; *Satterlee* v. *Matthewson*, 2 Peters 380, 7 L. ed. 458, 468; *Crowell* v. *Randell*, 10 Peters 368, 9 L. ed. 458; *Craig* v. *Missouri*, 4 Peters 410, 7 L. ed. 903; *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Peters 245, 7 L. ed. 412).

B.

**Record Does Not Properly Present a Substantial Federal Question.**

This contention is frivolous in the extreme. There was drawn in question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States and the decision of the state Supreme Court was in favor of its validity. This court has jurisdiction. Section 237(a), Judicial Code (Title 28 U. S. C. A., section 344).

The question has never been decided by this court, but in *Aluminum Company* v. *Ramsey*, 222 U. S. 251, 56 L. ed. 185, this court refused to uphold the act as applied to all corporations, as the Supreme Court of Arkansas had done, but affirmed the judgment on the ground that the act was valid as to railroad companies and that appellant being a railroad company could not question the validity of the act as to corporations in general. In that case this court questioned the reasoning of the Arkansas court in upholding the act as to corporations in general, saying:

> "In *Ozan Lumber Co.* v. *Biddle, supra,* the court decided that 'the fellow-servant law' was an amendment to the charters of corporations, made under the right reserved in the Constitution of the state to repeal, alter, or amend such charters. The Ozan Lumber Company, however, was a domestic corporation and whether the principle of the decision would be applicable to foreign corporations, as plaintiff in error in the case at bar is, being a Pennsylvania corporation, depends on many considerations, and involves questions not local; so we pass to the consideration of the merits."

In the numerous decisions of the Arkansas Supreme Court upholding the act as to corporations, no reason has ever been given other than that expressed in *Ozan Lumber Co.* v. *Biddle,* 87 Ark. 587, 113 S. W. 796; namely, that the power existed under the reservation to the state of the right to amend charters of corporations.

The opinion of the state Supreme Court in this case was by a divided court—4 to 3. Similar statutes have been held unconstitutional by the Supreme Courts of Mississippi and Indiana, respectively, and by the Circuit Court of Appeals for the Eighth Circuit. *Ballard* v. *Mississippi Cotton Oil Co.,* 81 Miss. 507, 34 So. 533, 62 L. R. A. 407, 95 A. S. R. 476; *Bedford Quarries Co.* v. *Bough,* 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (n.s.) 418; *Chicago, M. & St. P. Ry. Co.* v. *Westby,* 178 Fed. 619. Arkansas stands alone among the courts passing upon this question and its reasoning in upholding the statute has been at least questioned by this court.

Burdens placed upon corporations by state statutes because they are such, having no reasonable support in that fact, and not placed upon individuals and partnerships, have consistently been held by this court to contravene the Fourteenth Amendment to the Constitution of the United States. *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis,* 165 U. S. 150, 41 L. ed. 666; *Kentucky Finance Co.* v. *Paramount Auto Exchange,* 262 U. S. 544, 67 L. ed. 1112; *Power Mfg. Co.* v. *Saunders,* 274 U. S. 490, 71 L. ed. 1165; *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 72 L. ed. 927. And see *Frost* v. *Corporation Commission of Oklahoma,* 278 U. S. 516, 73 L. ed. 483, where it was held that burdens placed upon individuals and not upon corporations where there

was no reasonable ground for the distinction contravene the Fourteenth Amendment.

These considerations abundantly support the jurisdiction of this court. In *Louisville & Nashville R. Co.* v. *Melton*, 218 U. S. 36, 54 L. ed. 921, this court said:

> "We primarily dispose of a motion to dismiss, which is rested upon the ground that the federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the federal question relied upon will be found, upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations: *(a)* Because analysis and expounding are necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented; *(b)* because the division in opinion of the lower court as to whether the statute as construed was repugnant to the equal protection clause of the 14th Amendment suggests that the controversy on the subject here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below; and *(c)* because, while an examination of the opinions of state courts of last resort will show that there is unanimity as to the power, consistently with the equal protection of the law clause, to classify railroad employees actually engaged in the hazardous work of moving trains, such examination will also disclose that there is some conflict of view as to whether a statute on that subject as broad as is the

statute under review, as construed below, is consistent with the clause, thus additionally serving to point to the necessity of analyzing and considering the subject anew instead of treating it as being so obviously foreclosed as not to permit an examination of the subject."

Color for the contention that the statute is unconstitutional is all that is required to present a substantial federal question. *Wilmington Star Mining Co.* v. *Fulton*, 205 U. S. 60, 51 L. ed. 708.

Appellee contends that the statute will not be declared unconstitutional unless facts made known or generally assumed are such as to preclude the assumption that the classification rests upon some rational basis. The cases cited, however, do not go to the extent requisite to uphold the classification made by the Arkansas statute. Counsel for appellee advance as the only concrete reasons which the legislature may have had in mind in enacting the statute that "the Legislature may have believed that an individual master who would of necessity come in personal contact with his men and their families would feel sufficient moral responsibility for their safety to insure that he would employ only careful and prudent men to work with them, while in the case of a corporation, acting only through agents, with the management often far removed from the scene of operations, no such personal and moral responsibility would exist and the safety of men could be better insured by making the corporation responsible for the negligent acts of the men whom it employed.

"Likewise, the Legislature may have found that generally in Arkansas corporations were engaged in that type of business which carried with it increased hazards to their employees, such as manufacturing, mining, operating rail-

roads, street cars, electrical systems, gas lines, etc., while as a general rule the individual employer was engaged in business where his employee was relatively safe, such as agriculture, the trades, etc."

The first theory makes an unwarranted assumption of facts. An individual master does not "of necessity come in personal contact with his men and their families." While the management of a corporation is often far removed from the scene of operations, the same is true of individual and partnership employers. And the fact that the legislature may have thought that individual employers would feel sufficient moral responsibility for the safety of their employees to employ only careful and prudent men to work with them would not be a sufficient basis for classification. Even at common law masters were liable for negligently employing incompetent fellow-servants, and neither individuals nor corporations could be expected to use more than reasonable care in employing servants, whether made liable or not for the negligence of their employees resulting in injury to a fellow-servant.

Section 1700, Crawford & Moses Digest of the Statutes of Arkansas, authorizes the formation of corporations to engage in any lawful business. Section 1825 authorizes foreign corporations to do business in the state. It would be fantastic to assume that corporations in Arkansas are engaged only in the more hazardous businesses while the individuals are engaged in only those that are relatively safe. That the legislature had no such thought in mind is clearly shown by the statute itself. The statute specifically includes railroad companies and coal mining companies, whether incorporated or not, thus showing that the legislature thought those businesses were particularly hazardous and required

separate classification, and that applying the act to corporations only would not be sufficient to reach them. If counsel's theory is correct the statute would have made no mention of railroad or coal mining companies but would have applied to corporations only. But the legislature knew what all reasonable men know; that corporations and individuals in Arkansas are engaged in all kinds of businesses, some hazardous, some safe, and that the character of the employer (whether incorporated or not) is no criterion of the nature of the business. The court will not assume otherwise.

Had the statute of Arkansas permitted corporations to be formed or admitted to carry on certain hazardous businesses only and prohibited individuals from engaging in such businesses, then it perhaps would have been permissible to classify corporations and individuals for the purpose of the fellow-servant act. But, inasmuch as the statute authorizes corporations to carry on any lawful business, the court will not indulge in the fantastic assumption that there are differences in those businesses in which corporations are engaged from those in which individuals are engaged sufficient to justify the classification, and the court can only conclude that the classification of corporations was purely arbitrary. This has been confirmed repeatedly by the Supreme Court of Arkansas in upholding the act. No justification for the classification has ever been attempted by that court other than the one time, *Ozan Lumber Co.* v. *Biddle, supra,* wherein the court said:

> "Acts of legislatures imposing such liability on railroad companies have been upheld by the courts on account of the hazardous character of the business of operating a railway. The only difference of the reason

for such acts and the act in question is the danger of the service of railroads is greater than that of other corporations—a difference in degree, and not in kind."

The court thus wholly fails to give any reason for discriminating between corporations and individuals engaged in the same business.

C.

**Question One of Local Law.**

This identical contention was made in the case of *Aluminum Company* v. *Ramsey, supra,* as to the identical statute and was rejected. See, also, *Lake Shore & Mich. So. Ry. Co.* v. *Smith,* 173 U. S. 684, 43 L. ed. 858, 864; *Stearns* v. *Minnesota,* 179 U. S. 223, 45 L. ed. 162; *Chicago, M. & St. P. R. Co.* v. *Wisconsin,* 238 U. S. 491, 59 L. ed. 1423, L. R. A. 1916-A, 1133.

Respectfully submitted,

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